



February 1, 2001

Ms. Katherine Cahill
Managing Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2001-0383

Dear Ms. Cahill:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 143831.

The San Antonio Water System ("SAWS") received two requests from the same requestor, one dated November 8, 2000, which you state was received by SAWS on that date, and one dated November 9, 2000. The November 8 request seeks

copies of all documents, memoranda, facsimiles, e-mails and phone records pertaining to the dispute at [the requestor's residence] between the dates of June 25, 2000 to the present [including] a copy of the report produced by Rimkus Engineering, its accompanying transmission letter, and the report from the geo-technical firm that tested [the requestor's] property on September 19, 2000.

The requested dated November 9, 2000 seeks

the SAWS records for the past 20 years for repairs to the SAWS transmission line in the block of Merrimac Street between Stratford Court and Monticello Court.

You have submitted for our review an "investigative file" containing information that we understand to be responsive to the request dated November 8, 2000. You assert that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

At the outset, we note that your request for a decision of this office in which you assert section 552.103, dated November 21, 2000, only references the request dated November 8, 2000 and states that a copy of that request is enclosed. However, the November 8, 2000 was not attached to the correspondence. Instead, the November 9, 2000 request was attached. Nevertheless, this office located in the submitted "investigative file" a request letter from the requestor dated November 8, 2000 as described above. We assume this is the request that prompted your November 21, 2000 correspondence requesting a decision of this office.

As to the request dated November 9, 2000, this office has no record of SAWS requesting a decision of this office. *See* Gov't Code § 552.301(a) (absent a previous determination about whether the information falls within an exception to required public disclosure, governmental body must ask for attorney general decision). As indicated above, the correspondence dated November 21, 2000 asserts the section 552.103 exception only with reference to the request dated November 8, 2000, and the submitted information evidently is responsive to that request. Because SAWS has not requested a decision of this office as required by section 552.301 of the Government Code with respect to the request dated November 9, 2000, the information that is responsive to the November 9, 2000 request is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302. Because you have not requested a decision of this office with respect to the November 9, 2000 request and have not submitted for our review the information that is responsive to that request, this office has no basis for concluding that a compelling reason exists to withhold any of the information responsive to that request. *See, e.g.,* Open Records Decision Nos. 150 (1977), 77 (1975) (concluding a compelling reason under predecessor to section 552.302 may exist only where the information is confidential by law or affects third party interests). Accordingly, pursuant to section 552.302, SAWS must release to the requestor in its entirety the information responsive to the request dated November 9, 2000.

We next address the section 552.103 assertion with respect to the submitted information. Section 552.103 excepts from disclosure information:

relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, SAWS must demonstrate that (1) litigation involving SAWS was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App. - Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). You contend that SAWS reasonably anticipated litigation at the time it received the November 8, 2000 request. To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take *objective steps* toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

As to the first prong of section 552.103, you assert SAWS reasonably anticipated litigation at the time of the present request because: 1.) the requestor had previously submitted a claim for property damage to SAWS; and 2.) SAWS retained outside counsel to represent SAWS with respect to the claim. In addition to these two factors which you assert as the sole basis for anticipating litigation, we note that the submitted file contains a letter from the requestor dated September 12, 2000 which contains a threat to sue. However, we have no indication that the requestor has taken any objective steps towards filing suit. The information you have

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

provided does not indicate, for example, that the requestor has retained an attorney. In addition, you have submitted no comments or arguments with respect to the second prong of section 552.103. We therefore conclude that the submitted information is not excepted from disclosure pursuant to section 552.103 and must be released to the requestor in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

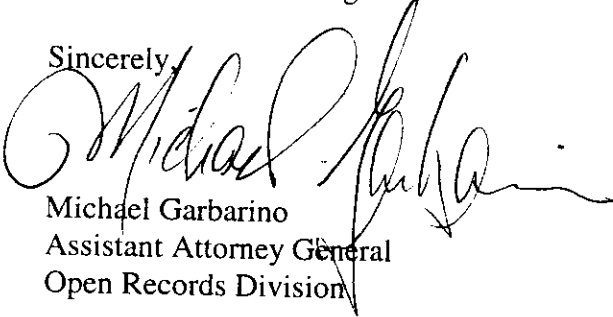
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", written over the typed name and title.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 143831

Encl. Submitted documents

cc: Mr. Clinton McKenzie
302 Stratford Court
San Antonio, Texas 78223-2028
(w/o enclosures)